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No. 82-707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

The petitioner railroads submit this supplemental brief to bring to the Court's attention a recent decision of the Eleventh Circuit that eliminates any question as to the existence of a clear and direct conflict between the decision below and the rulings of other courts of appeals. As discussed in the railroads' petition, the Court of Appeals in this case sought to distinguish the Eleventh Circuit's previous decision in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374 (1982)—holding that the ICC does not have authority to reject *effective* tariffs—on the ground that the regulation at issue there provided only for *informal* proceedings, whereas the regulation involved in this case will supposedly be enforced on *formal* complaint and hearing.

Pet. App. 11b n.6.[1] While this distinction is in fact without substantive significance (see Pet. at 13 n.22), the Eleventh Circuit has recently rendered a decision in *American Trucking Ass'n, Inc.* v. *United States*, 688 F.2d 1337 (1982), squarely holding that the ICC is without authority to reject an effective tariff whatever procedures are used and eliminating the purported distinction upon which the court below relied.

In *American Trucking Ass'n, Inc.*, the Eleventh Circuit ruled that the ICC may not enforce rate bureau provisions of the Interstate Commerce Act by rejecting tariffs "after the tariffs become effective." 688 F.2d at 1354. The court observed that "the plain meaning of rejection is to refuse to receive"; that it has previously been held "that 'rejection is a regulatory device properly used only *prior* to a tariff's effective date' "; and that the Act provides the Commission with a set of "enforcement powers," distinct from its rejection authority, to deal with effective tariffs that are found to be unlawful. *Id.* (citations omitted). The court also observed that rejection of effective tariffs "undermines the uniformity and reliability interests that the system of tariff filing was meant to foster." *Id.* at 1355. In short, "[r]eview of the statute, the major decisions, and policy" led the Eleventh Circuit to conclude "that rejection or suspension after a tariff becomes effective is in conflict with the statute and thus may not be done either as an interpretation of the statutory powers or by independent rulemaking." *Id.*

The ICC sought to avoid this result and to put aside the court's prior ruling in *Southern Motor Carriers* by argu-

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[1] Citations to "Pet. App. ____" refer to the appendix to the railroads' petition.

ing that the Commission decision at issue in *American Trucking Ass'n* envisioned "formal complaint procedures before the Commission prior to rejection of any tariff" (688 F.2d at 1354)—the distinction asserted by the court below in this case. The Eleventh Circuit recognized, however, that "providing more formal procedures does not cure the essential defect in rejecting or suspending effective tariffs, namely, that the statute and caselaw limit these powers to use against only proposed tariffs." *Id.* at 1356. Thus, the court held that the Commission may not exercise its rejection power over effective tariffs, whether it chooses to proceed by formal or informal procedures. See *id.* at 1354.[2]

In short, the Eleventh Circuit's recent decision in *American Trucking Ass'n* confirms that the decision in this case ignores the difference in the Commission's statutory authority over effective and proposed tariff rates and is in direct conflict with the holdings of other courts of appeals. Such conflict—which has considerable practical significance for the tariff rate system on which carriers and shippers alike rely (see Pet. at 19-21)—warrants plenary review of this case on certiorari. Cf. Rule 17.1(a), Sup. Ct. R.

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[2] The Eleventh Circuit in *American Trucking Ass'n* also rejected the Commission's reliance upon *Chicago, M., St.P. & P.R.R.* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir. 1957)—the decision upon which the court below principally relied (Pet. App. 13b-17b). Upon analysis, the Eleventh Circuit found *Alouette Peat* to be "internally inconsistent, contrary to the statute and consistent Commission decisions, and in conflict with Supreme Court precedent." 688 F.2d at 1356 (footnotes omitted). The Eleventh Circuit thus became the second circuit court in recent times to decline to follow *Alouette Peat*. See also *Genstar Chemical Ltd.* v. *ICC*, 665 F.2d 1304, 1309 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1750 (1982).

CONCLUSION

For the reasons stated above and in the railroads' petition, certiorari should be granted and the case set for plenary review by this Court.

Respectfully submitted,

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